

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JAMES GREGORY MARLOW,

No. C-10-1417 EMC (PR)

Plaintiff,

v.

**ORDER OF DISMISSAL**

VINCENT S. CULLEN, *et al.*,

Defendants.

**I. INTRODUCTION**

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. Defendants have filed a motion to deny Plaintiff's request to proceed *in forma pauperis* ("IFP"), and a motion to dismiss the action because Plaintiff has failed to exhaust his administrative remedies. For the reasons stated herein, Defendants' motion to deny Plaintiff's application for IFP status is **GRANTED**, Plaintiff's motion to proceed IFP is **DENIED**, and the action is **DISMISSED**. Defendants' motion to dismiss on exhaustion grounds is **DENIED** without prejudice.

**II. DISCUSSION**

The Prison Litigation Reform Act of 1995 was enacted, and became effective, on April 26, 1996. It provides that a prisoner may not bring a civil action IFP under 28 U.S.C. § 1915 "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under

1 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g). Section 1915(g) requires that  
2 this Court consider prisoner actions dismissed before, as well as after, the statute’s 1996 enactment.  
3 *Tierney v. Kupers*, 128 F.3d 1310, 1311–12 (9th Cir. 1997).

4 For purposes of a dismissal that may be counted under § 1915(g), the phrase “fails to state a  
5 claim on which relief may be granted” parallels the language of Federal Rule of Civil Procedure  
6 12(b)(6) and carries the same interpretation, the word “frivolous” refers to a case that is “of little  
7 weight or importance: having no basis in law or fact,” and the word “malicious” refers to a case  
8 “filed with the ‘intention or desire to harm another.’” *Andrews v. King*, 398 F.3d 1113, 1121 (9th  
9 Cir. 2005) (citation omitted). Only cases within one of these three categories can be counted as  
10 strikes for § 1915(g) purposes. *See id.* Dismissal of an action under § 1915(g) should only occur  
11 when, “after careful evaluation of the order dismissing an [earlier] action, and other relevant  
12 information, the district court determines that the action was dismissed because it was frivolous,  
13 malicious or failed to state a claim.” *Id.*

14 *Andrews* requires that the prisoner be given notice of the potential applicability of § 1915(g),  
15 by either the district court or the defendants, but also requires the prisoner to bear the ultimate  
16 burden of persuasion that § 1915(g) does not bar IFP status for him. *Id.* A dismissal under §  
17 1915(g) means that a prisoner cannot proceed with his action as a pauper under § 1915(g), but he  
18 still may pursue his claims if he pays the full filing fee at the outset of the action.

19 In the instant matter, a review of the dismissal orders in Plaintiff’s prior prisoner actions in  
20 the Northern District reveals that Plaintiff has had at least four such cases dismissed on the ground  
21 that they were frivolous, malicious, or failed to state a claim upon which relief may be granted.  
22 Defendants have given Plaintiff notice that the following four dismissals may be counted as  
23 dismissals for purposes of § 1915(g): (1) *Marlow v. Calderon, et al.*, No. 98-622 CW (civil rights  
24 action claiming “hypnotic psychotherapy, psychoanalysis, wavelength induction mindwashing”);  
25 dismissed for failure to state a claim); (2) *Marlow v. Calderon*, No. 98-821 CW (civil rights action  
26 claiming prisoners being poisoned, suicides being staged, correctional officials using  
27  
28

1 “microbroadcasting f.m. radio” as “high tech type ego-hunger, aggression induced wear down  
2 gestalt therapy); (3) *Marlow v. Morris*, C 98-1006 CW (civil rights action alleging claims against  
3 private actors); and (4) *Marlow v. Morris*, C 98-1719 CW (civil rights action alleging claim against  
4 private actor).

5 Plaintiff therefore may proceed IFP only if he is seeking relief from a danger of serious  
6 physical injury which is “imminent” at the time of filing. *Andrews*, 398 F.3d at 1052–53. Plaintiff  
7 alleges in his complaint that (1) Associate Warden Curzon told him that prison staff were permitted  
8 to punch him if he did not follow orders, the same staff controlled inmate appeals, and that the  
9 prison psychology staff will provide the “correctional terminator’s cover story”; (2) Dr. Ponath  
10 threatened to work with prison staff to silence Plaintiff and that there was no evidence that prison  
11 staff killed inmates; and (3) unnamed persons “keep playing w/me,” and “[p]romising to hang me,  
12 shoot me, pepper spray me with death, or beat me to death.”

13 Plaintiff has not shown that he was in danger of serious physical injury at the time he filed  
14 his complaint. First, Plaintiff allegations describe at most verbal threats of possible physical harm at  
15 some unknown time, possibly by unknown persons. Second, Plaintiff has made identical claims in  
16 his numerous prior complaints, *see, e.g., Marlow v. Calderon*, C 98-4793 CW (death threats and  
17 staged suicides), and never has come to any harm.

18 In view of this, Defendants’ motion to deny Plaintiff’s IFP application (Docket No. 56) is  
19 GRANTED, and, accordingly, Plaintiff’s IFP application (Docket No. 5) is DENIED. The Court  
20 finds that, pursuant to *Andrews*, Plaintiff has been given notice of the potential applicability of  
21 § 1915(g) by Defendants in their motion requesting the Court to revoke Plaintiff’s IFP status. 398  
22 F.3d at 1121. Rather than filing a proper opposition, Plaintiff has sent several letters that the Court  
23 will construe as an opposition. A review of these letters shows that Plaintiff has failed to meet his  
24 burden of showing that § 1915(g) does not bar IFP status for him. Therefore, a dismissal under  
25 § 1915(g) is proper because Plaintiff has had an opportunity to be heard on the matter before  
26 dismissing the action. *See id.* at 1120.

1 Accordingly, this action is hereby DISMISSED without prejudice to Plaintiff's filing a  
2 motion to reopen no later than 30 days from the date of this order accompanied by the full filing fee  
3 of \$350.00. *See* 28 U.S.C. § 1915(g).


4 Defendants' motion to dismiss on grounds of exhaustion is DENIED without prejudice. If  
5 Plaintiff moves to reopen and pays the filing fee, the Court will direct Defendants to renew their  
6 exhaustion motion.

7 This order disposes of Docket Nos. 5 and 56.

8 The Clerk shall enter judgment in favor of Defendants, and close the file.

9  
10 IT IS SO ORDERED.

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12 Dated: May 9, 2012

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EDWARD M. CHEN  
United States District Judge